No. 79-529

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 591 F. 2d 533.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17a-18a) was entered on February 22, 1979. A petition for rehearing was denied on June 6, 1979 (Pet. App. 19a-20a). On August 24, 1979, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including October 1, 1979, and the petition was filed on September 28, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner could properly take an immediate appeal from the denial of its motion under Fed. R. Crim. P. 41(e) for the return of documents seized from it and the suppression of the documents as evidence, where the documents were being used in a criminal proceeding against various officials and employees of petitioner.

STATEMENT

1. On July 8, 1977, FBI agents, acting pursuant to federal search warrants, conducted searches of two offices of petitioner in Los Angeles, California, and seized documents relating to the crimes of conspiracy, theft of government property, and obstruction of justice as specified in the affidavits supporting the warrants. At the same time, FBI agents executed a virtually identical warrant to search the office of the Founding Church of Scientology in Washington, D.C. (Pet. App. 2a-3a, 24a-28a, 141a-142a).

On July 12, 1977, petitioner filed a motion under Fed. R. Crim. P. 41(e) for the return of documents seized in the Los Angeles searches and the suppression of the documents as evidence. A similar motion was filed by the Founding Church of Scientology with respect to the District of Columbia search (Pet. App. 3a).

By memorandum and order dated July 27, 1977, Judge Bryant of the United States District Court for the District of Columbia granted the Founding Church's motion, finding that the warrant was unconstitutional on its face. *In re Search Warrant dated July 4, 1977*, 436 F. Supp. 689. Because of "the identity of the parties to both proceedings and the nearly identical warrants in both seizures" (Pet. App. 86a), Judge Lucas of the United States District Court for the Central District of

California ruled that Judge Bryant's decision collaterally estopped the government from litigating the validity of the Los Angeles warrants; he therefore granted petitioner's Rule 41(e) motion (Pet. App. 30a, 86a). However, on the government's appeal from Judge Bryant's decision, the United States Court of Appeals for the District of Columbia Circuit reversed, holding that the warrant was facially proper. *In re Search Warrant dated July 4, 1977*, 572 F. 2d 321 (1977). This Court denied the Founding Church's petition for a writ of certiorari. 435 U.S. 925 (1978).

Thereafter, Judge Lucas granted the government's motion for reconsideration of his previous order (Pet. App. 31a). Following two days of evidentiary hearings (*id.* at 33a, 90a), Judge Lucas rejected petitioner's contentions that the Los Angeles warrants were invalid under the First and Fourth Amendments as well as the claim that the warrants had been executed in violation of 18 U.S.C. 3109 and Fed. R. Crim. P. 41(d) (*id.* at 33a-34a, 84a-140a). After additional evidentiary hearings, Judge Lucas also rejected petitioner's contention that the searches and seizures in Los Angeles had been conducted in violation of the Fourth Amendment (*id.* at 23a-83a). Accordingly, Judge Lucas denied petitioner's motion under Fed. R. Crim. P. 41(e) (*id.* at 21a-22a).

2. Invoking 28 U.S.C. 1291, petitioner appealed the denial of its Rule 41(e) motion to the United States Court of Appeals for the Ninth Circuit. While the appeal was pending, a federal grand jury in the District of Columbia indicted 11 officials and employees of petitioner on charges of conspiracy, obstruction of

justice, and theft of government property. Many of the documents seized in the Los Angeles searches were presented to the grand jury.[1]

The Ninth Circuit dismissed the appeal (Pet. App. 1a-16a), holding that, in the circumstances of this case, the denial of petitioner's Rule 41(e) motion was not an immediately appealable order. Finding that petitioner's motion sought not only the return of property but also the suppression of evidence in present criminal proceedings (*id.* at 4a, 14a), the court concluded that "ongoing criminal proceeding[s] * * *[would] be interrupted by * * * [petitioner's] appeal from an order denying suppression of evidence that may be used in [those] proceeding[s]" (*id.* at 13a-14a). Although acknowledging (*id.* at 16a) that "[t]here must, at some point, be a remedy available to [petitioner] for the return of its property, if it has been unlawfully taken," the court held that "the present appeal is not that remedy. We decide nothing more."

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[1]Pursuant to a stipulation of evidence in the District of Columbia prosecution, nine of the 11 defendants were found guilty by Judge Richey on October 26, 1979. Seven defendants were convicted on Count XXIII of conspiracy to obstruct justice, to harbor a fugitive, and to make false declarations before a grand jury; one defendant was convicted on Count I of conspiracy to commit burglary, to steal government property, unlawfully to intercept oral communications, and to forge government credentials; and one defendant was convicted on Count XVII of the theft of government property. The remaining two defendants have recently been ordered extradited from England.

In connection with the District of Columbia prosecution, Judge Richey ruled that, with respect to documents seized from the defendants' offices and introduced in evidence against them, the execution of the Los Angeles warrants was not improper. See *United States* v. *Hubbard*, Cr. No. 78-0401 (D.D.C. Sept. 13, 1979). Some 200 documents seized during the Los Angeles searches were used as part of the stipulated record in the proceeding before Judge Richey.

ARGUMENT

Petitioner contends (Pet. 7-12) that, since it was not named as a defendant in the District of Columbia prosecution, it falls outside the rule of *DiBella* v. *United States*, 369 U.S. 121 (1962), that the denial of a motion under Fed. R. Crim. P. 41(e) is immediately appealable only if the motion is solely for the return of property and is not tied to a criminal prosecution *in esse*. At least in the circumstances of this case, however, the court of appeals correctly held that the district court's order denying petitioner's Rule 41(e) motion was not then appealable. Moreover, the court of appeals' decision does not conflict with the decisions of this Court or of the other courts of appeals. Finally, the question presented in the petition is not of practical significance in this case. Accordingly, review by this Court is unwarranted.

1. This Court has emphasized that the proper administration of the criminal justice system generally requires appellate review to await the entry of final judgment in the district court. See, *e.g.*, *United States* v. *Ryan*, 402 U.S. 530, 533 (1971); *DiBella* v. *United States*, *supra*, 369 U.S. at 124, 126, 129; *Cobbledick* v. *United States*, 309 U.S. 323, 325-326 (1940); cf. *United States* v. *Calandra*, 414 U.S. 338, 349-350 (1974). As the Court explained in *DiBella* (369 U.S. at 124, 126, 129) (footnote and citations omitted):

> This insistence on finality and prohibition of piecemeal review discourage undue litigiousness and leaden-footed administration of justice, particularly damaging to the conduct of criminal cases.
>
> * * * * *
>
> Moreover, the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law.

* * * * *

> To regard such a disjointed ruling on the admissibility of a potential item of evidence in a forthcoming trial as the termination of an independent proceeding, with full panoply of appeal and attendant stay, entails serious disruption to the conduct of a criminal trial.

See also *Cobbledick*, *supra*, 309 U.S. at 324-325. And "[a]s an instrument of * * * [a healthy legal system] the requirement of finality will be enforced not only against a party to the litigation but against a witness who is a stranger to the main proceeding." *Cobbledick*, *supra*, 309 U.S. at 326.

The court of appeals correctly concluded (Pet. App. 13a-14a) that these considerations militated against allowing petitioner to pursue an immediate appeal from the denial of its Rule 41(e) motion. The concerns underlying the *DiBella* rule are not obviated by the fact that petitioner was not ultimately named as a defendant in the District of Columbia prosecution. Many of the documents at issue in petitioner's Rule 41(e) motion were presented to the District of Columbia grand jury that subsequently indicted 11 of petitioner's officials and employees; approximately 200 of these documents were included in the stipulated record before Judge Richey that served as the basis for the convictions of the defendants. Furthermore, these documents were and are being used both by other grand juries investigating petitioner and its officials and employees, and in proceedings to extradite from England two persons

already indicted by the District of Columbia grand jury. In these circumstances, the potential for petitioner to disrupt ongoing criminal proceedings is manifest.[2]

2. In addition, notwithstanding petitioner's assertion (Pet. 7), the court of appeals' decision does not conflict with the decisions of this Court or of the other courts of appeals. Petitioner relies principally on *United States* v. *Ryan*, *supra*. However, the Court in *Ryan* explained the controlling rule as follows (402 U.S. at 533):

> Only in the limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims have we allowed exceptions to this principle [of finality]. We have thus indicated that review is available immediately of a denial of a motion for the return of

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[2]We note (Pet. App. 4a-5a, 28a) that the government has supplied petitioner with two copies of each document seized, except for certain sensitive or confidential documents belonging to the government that petitioner is not entitled to have. See *In re Search Warrant dated July 4, 1977*, *supra*, 572 F. 2d at 327 n. 3. The government has also returned all copies of any of petitioner's documents that were ultimately determined not to bear on the criminal investigations. Thus, at this point "the principal purpose of [the Rule 41(e)] action is to determine whether the Government will be free to use the documents in possible future criminal proceedings" (Pet. App. 28a). However, with respect to the grand jury investigation, *United States* v. *Calandra*, 414 U.S. 338, 354 (1974), would seem to permit use of the documents regardless of the legality of the searches and seizures. In addition, *Calandra* also suggests that compliance with petitioner's Fourth Amendment rights is to be measured as of the time of the challenged search and seizure without regard to the government's subsequent use of the seized documents; application of the exclusionary rule to bar such use "presents a question, not of rights, but of remedies" (414 U.S. at 354). See also *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 555, 560 (1978) (government's interest in enforcing the criminal law and securing evidence is the same whether or not the third party subject to the search is culpable).

> seized property, where there is no criminal prosecution pending against the movant. See *DiBella* v. *United States*, *supra*, at 131-132. Denial of review in such circumstances would mean that the Government might indefinitely retain the property without any opportunity for the movant to assert on appeal his right to possession.

See also *Cobbledick*, *supra*, 309 U.S. at 324-325. The court of appeals' decision in this case did not "render impossible any review whatsoever," but rather held only that immediate appellate review was not available. Similarly, since a criminal prosecution involving the documents in dispute had been instituted against petitioner's officials and employees, the court of appeals' decision did not "mean that the Government could indefinitely retain [petitioner's] property without any opportunity" for appellate review.[3] Thus, the decision in this case is fully consistent with *Ryan*.

The court of appeals' decision is also consistent with the decisions of the only other two courts of appeals that, to our knowledge, have considered the issue. In *Application of United States*, 427 F. 2d 1140, 1141 (5th Cir. 1970), a group of appellants sought review of the denial of their Rule 41(e) motions; some of the appellants had been indicted, but the rest had not. *United States* v. *Glassman*, 533 F. 2d 262 (5th Cir. 1976). The court in *Application of United States* held that the district court's order was nonappealable even as to those appellants who were not yet under indictment. Similarly,

[3]Compare *Mr. Lucky Messenger Service, Inc.* v. *United States*, 587 F. 2d 15 (7th Cir. 1978) (neither movant nor any of its agents or employees had been charged in a criminal prosecution, and more than 17 months had elapsed since the seizure).

in *Parrish* v. *United States*, 376 F. 2d 601, 603 (4th Cir. 1967), the movants, a husband and wife, sought to appeal the denial of their Rule 41(e) motion; the husband was indicted, but the wife was not. The court of appeals held that neither movant could obtain immediate appellate review of the district court's order. Thus, in these cases, as in the instant one, the existence of a criminal proceeding in which the search-and-seizure issue could eventually be reviewed by the appellate court was found to foreclose the immediate appeal of the denial of a Rule 41(e) motion even by a person who was not a party to the criminal action.[4]

3. Finally, this case retains only limited practical significance. As discussed above (note 1, *supra*), Judge Richey has upheld the validity of the Los Angeles searches and seizures insofar as documents seized from the defendants during those searches were included in the

[4]None of the decisions on which petitioner relies (Pet. 7-12) is to the contrary. In *United States* v. *Williams*, 459 F. 2d 909 (6th Cir. 1972); *United States* v. *Alexander*, 428 F. 2d 1169 (8th Cir. 1970); *Coury* v. *United States*, 426 F. 2d 1354 (6th Cir. 1970); and *Gottone* v. *United States*, 345 F. 2d 165 (10th Cir. 1965), no criminal prosecutions in which the challenged evidence would be used were pending against either the person filing the Rule 41(e) motion or any other person. The court in *Shea* v. *Gabriel*, 520 F. 2d 879, 882 (1st Cir. 1975), expressly declined to reach the question whether it had jurisdiction to entertain an appeal from the denial of a Rule 41(e) motion where the movant was not the subject of a pending prosecution. In *United States* v. *Glassman*, *supra*, 533 F. 2d at 263; *Meier* v. *Keller*, 521 F. 2d 548, 556 (9th Cir. 1975); *Smith* v. *United States*, 377 F. 2d 739, 742 (3d Cir. 1967); and *Austin* v. *United States*, 353 F. 2d 512 (4th Cir. 1967), the courts held that the denial of the Rule 41(e) motion was nonappealable because of the existence of a pending criminal proceeding against the movant. Thus, none of the cases petitioner cites have upheld immediate appellate review of the denial of a Rule 41(e) motion that is tied to an ongoing criminal prosecution to which the movant is not a party.

stipulated record in the District of Columbia prosecution.[5] The defendants in that case have now been convicted and sentenced. The judgment of the district court is thus subject to appeal and the issue of the legality of the Los Angeles searches and seizures underlying the adduced documents will receive appellate scrutiny. In addition, petitioner has received copies of all seized documents to which it is lawfully entitled (see note 2, *supra*). And the copies of petitioner's documents retained by the government have already been used in the ongoing criminal proceedings and have recently been disclosed to the public pursuant to order of the district court in the District of Columbia. In these circumstances, little purpose would be served by this Court's consideration of the appealability of petitioner's motion under Rule 41(e) for the return of its documents and the suppression of the documents as evidence.[6]

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[5]The district court held that four of the defendants had standing to contest the Los Angeles searches and seizures with respect to documents taken from their offices and used at trial against them. In any event, and notwithstanding petitioner's fears of governmental abuses (Pet. 12), this Court has rejected the argument that additional Fourth Amendment protections are necessary in the area of third-party searches because of the unavailability of the exclusionary rule to deter misconduct. See *Zurcher* v. *Standard Daily*, 436 U.S. 547, 562-563 n.9 (1978) Moreover, although it was not indicted, any claim by petitioner of "third party" status in connection with the criminal investigation leading to the search of its premises would be spurious.

[6]Furthermore, beyond the issue of appealability, petitioner seems to assume that two courts of appeals—the District of Columbia Circuit and the Ninth Circuit—should simultaneously determine the legality of the very same searches and seizures. We submit, however, that only one appellate court should review the validity of the Los Angeless searches and seizures. As the Court said in *DiBella*, *supra*, (369 U.S. at 132, quoting *United States* v. *Lester*, 21 F.R.D. 30, 31 (S.D. N.Y. 1957), "[such a] course will avoid a needless duplication of effort by two courts and provide a more expeditious resolution of

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1979

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the controversy * * *." In the circumstances of this case, deference should appropriately be given to the court reviewing the criminal convictions. The Court need not consider this issue to dispose of the petition; we note only that the appealability question is not the sole impediment to the appeal sought by petitioner.

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